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BETWEEN A ROCK OF UNCERTAINTY AND A HARD CASE

In *Zurich Insurance PLC v International Energy Group Ltd* [2015] UKSC 33; , seven Supreme Court Justices considered a number of issues created by the special causal rule developed in *Fairchild v Glenhaven Funeral Services* ([2003] 1 A.C. 32). IEG is a solvent gas supply company, based in Guernsey, whose predecessor in title, Guernsey Gas Light Co Ltd (GGLCL), was responsible for exposing Mr Carré to asbestos dust at a consistent level throughout his 27 year period of employment, under circumstances which amounted to a breach of GGLCL's duty. When Mr Carré subsequently developed mesothelioma, therefore, IEG settled his claim on the basis of its predecessor having materially increased his risk of developing that disease, relying on the exceptional departure from the but for test now associated with *Fairchild*. The settlement consisted of a compensation payment of £250,000 in damages and interest plus £15,300 towards Mr Carré's costs. In addition, IEG incurred defence costs of £13,151.60.

The difficulties in *Zurich* stem from the fact that GGLCL had only had liability insurance for eight of the 27 years during which Mr Carré had been exposed to asbestos (employers' liability insurance was not compulsory in Guernsey until 1993). Two of those eight years had been with the Excess Insurance Co Ltd and six with Midland Assurance Ltd, to whose liabilities Zurich had succeeded. Zurich initially offered to meet 72/326ths of the damages and interest paid, and of the defence costs incurred, calculated to represent the six out of 27 years of exposure during which Midland had been on risk. At trial, Cooke J accepted Zurich's argument as to its purported share of compensation, but ordered it to pay 100% of the defence costs. The Court of Appeal allowed IEG's appeal, rejected Zurich's cross-appeal and ordered the latter to pay 100% of both the compensation paid, and the costs incurred by, IEG.

The two principal issues to be considered by the Supreme Court were:

- 1) Does *Barker v Corus* remain a valid common law rule following the enactment of the Compensation Act 2006 so that, where the Compensation Act does not apply, each defendant's liability will be apportioned according to the period of time during which it exposed the claimant to asbestos?
- 2) In any event, in situations to which *Barker* does not apply (either because it no longer represents the common law position, or because the Compensation Act 2006 applies), meaning that the defendant is liable for the whole of the claimant's loss, is an insurer who was on risk for only part of the period of exposure also liable for the whole loss?
- 3) Is such an insurer liable for the whole of the insured's defence costs?

Whilst the relevance of all of these issues is obvious for Guernsey, where the Compensation Act 2006 does not apply, the significance to the UK of the second point in particular, is considerable. The initial Supreme Court hearing, in front of five Justices, led to a rehearing in front of seven: Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Reed, Lord Carnwath and Lord Hodge. The Court was in agreement on the first and final points:

This court is unanimously of the view that section 3 of the Compensation Act 2006 did not change the common law, which the House of Lords had laid down in *Barker v Corus UK Ltd* [2006] 2 AC 572, but overrode it only to the extent that the section provides. The court also holds, unanimously, that the appeals fails on the issue of defence costs. (Lord Hodge at [100]).

Barker established that, where the special rule in *Fairchild* applies to establish liability, defendants' liability would be apportioned according to the relative periods of time during which they had exposed claimants to asbestos. The effect of recognising that it still represents the common law position, therefore, was to establish that Zurich's liability to IEG would be correspondingly proportionate to the six out of 27 years during which the latter was exposed to asbestos. This point was accepted by all parties and is, according to Lord Mance (at [26]), "a corollary of the fundamental principle of indemnity, which governs liability insurance".

The issue with regard to defence costs was briefly dispatched by the Court as a whole, on the premise that the insurance contracts covered defence costs on a straightforward causative basis, and since the extent of those costs was in no way affected by whether the claim covered six or 27 years, there was no basis on which they should or could be prorated (see Lord Mance at [94]). It is the second question outlined above which divided the Court. As Lord Neuberger and Lord Reed, (agreeing with Lord Sumption) identified at [200], there exist three conceivable solutions to this question.

The first is the one that had been adopted by the Court of Appeal. On its view, (having decided that *Barker* was no longer good law), it held that any insurer on risk for any of the periods during which an insured exposed its employee to asbestos would be liable for the entire loss, with no allowance made for periods when the risk lay elsewhere. Both Toulson LJ and Aikens LJ reasoned that such an outcome was the inevitable result of *Durham v BAI (Run off) Ltd* ([2012] UKSC 14; [2012] 1 W.L.R. 867 (the *Trigger Litigation*)), in which the Supreme Court deemed that, in cases engaging the special rule in *Fairchild*, an insurer's liability is triggered by any period of exposure during which it was on risk. This interpretation of *Trigger*, which was the position argued for by IEG, equates the relationship between the employer and employee with the relationship between an insured and an insurer: since employers will be liable in full under the special rule if they wrongfully exposed their employee to asbestos at any time, the same should be true of any insurer on risk during any period of exposure. This was an approach which no member of the Supreme Court was willing to accept.

The second possible solution is that taken by a majority of the Supreme Court. In giving the leading judgment, with which Lord Clarke, Lord Carnwath and Lord Hodge agreed, Lord Mance considered that Zurich should be "answerable in the first instance for IEG's liability towards Mr Carré" but that the Court should go on to recognise "an equity, based on consideration of the wider circumstances – in particular GGLCL/IEG's exposure of Mr Carré for further periods when it was not insured by Midland – requiring IEG itself to contribute towards Zurich's costs of meeting such liability." At [72]. This approach, according to Lord Hodge (at [110]) and Lord Sumption (at [119]) accords with that already adopted in practice by the London insurance market in the wake of *Fairchild*, whereby insurers, having paid out on any policy on which they are on risk, then seek contribution from other insurers with the same contractual exposure. The consequence of the majority decision in *Zurich* is to treat insureds in the same way; liable to contribute for periods during which they had no external cover, acting effectively during those periods as self-insurers. Lord Hodge nevertheless deemed it to be the "more radical" of the two approaches identified by the Supreme Court (at [101]).

The third and final approach is that proposed in the dissenting judgment of Lord Sumption, with whom Lord Neuberger and Lord Reed agreed. This was to recognise that any insurer who had not been on risk for the whole of the relevant period was *not* answerable in the first instance for the whole of the loss, but only ever to be liable on a prorated basis (this, despite the fact that all

parties had accepted that the result would always begin with an insurer being answerable in full; see Lord Mance at [9]). Lord Sumption's method is founded expressly on a contractual basis:

"The liabilities of an insurer are wholly contractual. The answer to the questions now before the court necessarily depend on the construction of the contract and on nothing else...The suggestion that some doctrine of law can be devised which imposes on an insurer in one year the risk that insurers of other years may become insolvent, or that in other years the employer may fail to insure at all, is both unprincipled and unjust. The suggestion that equity can partially adjust the result of this injustice by requiring the insured to repay to the insurer part of the insurance moneys which the latter was contractually obliged to pay him, is contrary to basic principles of law." At [113].

The approach of the majority, by contrast, was clearly one viewed through the lens of tort law, as fashioned by *Fairchild*, *Barker*, the Compensation Act 2006 and the *Trigger* litigation:

"...it is consistent with the policy of the United Kingdom Parliament that the employee-victim should be able to obtain damages for his loss in a straightforward way." Lord Hodge at [106].

But what is sauce for the wrongdoing goose is not necessarily sauce for the prudently reckoning gander. Tort and contract are rarely normatively commensurable. The special rule in *Fairchild* was crafted to address a very specific *moral* quandary. Had it not been developed in that case (from its original incarnation in *McGhee v National Coal Board* ([1973] 1 W.L.R. 1)), the House of Lords would have allowed employers to enjoy an effective immunity whenever more than one of them had exposed to asbestos an employee who later contracted mesothelioma. In corrective justice terms, this was a stark choice indeed: the state of medical knowledge about the aetiology of mesothelioma is such that, where the asbestos which triggers it comes from multiple sources, any claimant will *in principle* not be able to prove his case on the balance of probabilities. The asbestos-mesothelioma cases are neither difficult, nor hard. They are, when subject to orthodox rules, impossible. There is no doubt, therefore, that the special rule, allowing such claimants to establish causation so long as they can prove that any defendant materially increased the risk of their developing mesothelioma, was a desperate measure. It is defensible only on the basis that it redressed what would otherwise have amounted to a systemic injustice between duty-breaching, profit-seeking employers and the employees to whom they externalised their risks. As between an insured and an insurer, there is no such inherent imbalance, moral or otherwise.

To fail to heed to this distinction is, however, to create just such an imbalance. As Lord Mance points out (at [78]), where the insured is solvent, as was the case in *Zurich* itself, there will be little practical difference between the approach of the majority and that advocated by Lord Sumption. The implications of the majority decision, however, are that the risks of both insurer insolvency and an absence of insurance will be borne by any solvent insurer who was on risk at *any* time during the relevant period. This "entirely severs the functional connection between premiums and risk" (Lord Sumption at [155]). Section 3 of the Compensation Act 2006 declares liability imposed under the rule in *Fairchild* to be joint and several in any case involving asbestos and mesothelioma. The combined effect of this and the special rule in *Fairchild*, described by Lord Phillips in *Sienkiewicz v Grief* ([2011] UKSC 10; [2011] 2 A.C. 229 at [58]) as "draconian", is to impose a double risk on any defendant: the risk that it might be held liable despite having made no difference to the claimant's position, and the risk that, if all other defendants are insolvent or non-existent, that it will be liable for the claimant's full damages with no opportunity to seek contribution. For reasons already outlined, this evil is lesser than its alternative, which would be to impose instead the same

double risk on an injured claimant. To follow the majority model in *Zurich*, however, is to impose a similarly onerous double risk on insurers. Given that “[i]nsurers are not wrongdoers” (Lord Sumption at [157]), this imposition lacks the moral justification which could be offered in support of the special causal rule and its statutory companion.

Nevertheless, that same moral justification is the one which appears to have had some bearing on the outcome in *Zurich*. Maximising the chances of mesothelioma claimants being able to recover their damages in full is the clear combined aim of section 3 Compensation Act, the *Trigger* litigation and the Mesothelioma Act 2014 (the latter of which provides for a scheme from which workplace mesothelioma victims can be paid in the event that they are unable to bring an action against any employer or insurer – see Lord Mance at [6] and Lord Sumption at [172]). The majority in *Zurich* regarded this as a basis for maximising a claimant’s protection from the risk of insolvency insofar as the law is able to do:

“...it is consistent with the United Kingdom Parliament that the employee-victim should be able to obtain damages for his loss in a straightforward way” (Lord Hodge at [106]).

Indeed, at [108], Lord Hodge goes as far as to say that pro rata liability on the part of insurers would be inconsistent with the decision in the *Trigger* litigation. The eponymous point in *Trigger*, however, is the crucial one: insurers on risk for industrial illnesses and injuries should not be able to avoid liability for mesothelioma because of the uncertainty as to *when* precisely the disease was triggered. In that case, the court was concerned to avoid a situation in which the special rule carved out in *Fairchild* would be stripped of any practical effect by the wording commonly employed in employer insurance contracts:

“It is inappropriate for the common law to redefine liabilities so that they are not susceptible to being insured by policies already in place, and then to call the result principled.” (R.Merkin and J.Steele, *Insurance and the Law of Obligations* (Oxford, Oxford University Press, 2013), at p. 364)

But this, a decision preventing insurers from relying on semantics to make a particular risk uninsurable, does not lead logically or legally to a conclusion that they should therefore be liable during periods when they are not on risk. Liability imposed on the basis of the special rule in *Fairchild* is calibrated by risk: whilst the disease itself is the gist of the claim, risk is the retrospective means by which liability is imposed, because it is the *only* way in which liability can be imposed. It does not follow from this that mesothelioma is caused by every period of exposure. In fact, were that to be the implication of *Fairchild*, it would have created nothing exceptional at all, since that is also the implication of the orthodox material contribution *to injury* situation illustrated by *Bonnington Castings v Wardlaw* ([1956] A.C. 613), which was deemed to be inapplicable in *Fairchild*. The crucial difference between the orthodox and exceptional rules is the “rock of uncertainty”; any case of mesothelioma might be caused by a given period of exposure and no other, but it might also be caused by several, or all, periods of exposure. This is why liability under the special rule is based on a given defendant’s *material contribution* to a homogeneous risk. If an insured is liable for *contributing* to such a risk, it is not clear why its insurance policy should be interpreted as if it were solely responsible for causing the injury itself.

There is general recognition that the special rule developed in *Fairchild* has generated shockwaves throughout the law of negligence, a state of affairs described in *Zurich* as “a sort of juridical version of chaos theory” (Lord Neuberger and Lord Reed at [191]). There is very good reason, therefore, to prevent those distorting effects from spreading further. This is particularly so where that spread

threatens to affect the law of contract and the principle of certainty which it holds so dear. In the specific context of insurance contracts, there is also the very real danger that the next set of problems emanating from the special rule will relate to reinsurance and the matrix of cover at the next tier 'up'. It is only a matter of time before issues in contracts of insurance become issues in contracts of reinsurance. English authorities, for instance, currently suggest that an insurer is not free "to maximise its recovery from reinsurers by manipulating allocation" of its risks across different years of cover (R.Merkin and J.Steele, *Insurance and the Law of Obligations* (Oxford, Oxford University Press, 2013), at p. 380), but this is a point as ripe for challenge as it is liable to disrupt reinsurance practices.

Whilst Zurich itself did not argue for the approach advocated by the minority, despite its obvious advantages for insurers, this could well be because "the insurance market may fear that, if the court adopts the solution favoured by Lord Sumption, Parliament will intervene as it did following *Barker*." (at [203]). There is evidence that the same concern had a bearing on the decision of the majority (see Lord Hodge at [106]). As Burrows has pointed out, however:

"To hold back a development on the basis of a chance that Parliament may intervene represents nothing less than an abdication of judicial responsibility. Better it is for the courts to proceed knowing that, of course, the Legislature is always free to impose a statutory solution or amendment if the common law approach is thought unsatisfactory or incomplete." ((2012) 128 L.Q.R. 232, at p. 248)

The common law should certainly consider whether its "initiatives are in harmony with legislative policy expressed in statutes" (at [106]). It is not obvious, however, that a legislative policy relating to negligence requires the courts to try and achieve harmony with it in a way which has inevitable implications for both insurance and contract law more generally. In a negligence action, the claimant and defendant make up a single unit in corrective justice terms (A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart, 2009), at p.214). Insurers are not part of that unit, and, whilst they have an obvious role to play in ensuring that claimants' rights can have practical corrective effect, they remain independent of the moral nexus which connects the parties to a negligence action. The tort of negligence is still dealing with the effects of an audacious departure from principle. Those effects should not be permitted to compound the erosion of principle across the common law.

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